



Bercovicz did not apply for the examination for Police Captain (PM0620V), Asbury Park, which had a closing date of September 30, 2017, and an application deadline date of July 21, 2017. This examination was open to employees in the competitive division currently serving and having an aggregate of one year of continuous permanent service as of the closing date as a Police Lieutenant. Permanent service is gained from a regular appointment and the completion of a working test period. In this case, two Police Lieutenants applied for, took and passed the two-part examination, and the eligible list was promulgated on March 29, 2018.

*N.J.A.C. 4A:4-2.6(a)* (Eligibility for promotional examination) states in pertinent part that applicants for promotional examinations shall, by the closing date, meet the criteria of having one year of continuous permanent service for an aggregate of one year immediately preceding the closing date in a title or titles to which the examination is open.

*N.J.A.C. 4A:4-1.10(c)* provides that when a regular appointment has been made, the Commission may order a retroactive appointment date due to administrative error, administrative delay or other good cause, on notice to affected parties.

*N.J.A.C. 4A:4-3.4(a)* provides that the Commission may revive an expired eligible list under the following circumstances:

1. to implement a court order, in a suit filed prior to the expiration of the list;
2. to implement an order of the Commission in an appeal or proceeding instituted during the life of the list;
3. to correct an administrative error;
4. to effect the appointment of an eligible whose working test period was terminated by a layoff; or
5. for other good cause.

## CONCLUSION

A review of the settlement indicates that it substantially complies with Civil Service law and rules. The policy of the judicial system strongly favors settlement. *See Nolan v. Lee Ho*, 120 N.J. 465 (1990); *Honeywell v. Bubb*, 130 N.J. Super. 130 (App. Div. 1974); *Jannarone v. W. T. Co.*, 65 N.J. Super. 472 (App. Div. 1961), *cert. denied*, 35 Nthirie.J. 61 (1961). This policy is equally applicable in the administrative area. A settlement will be set aside only where there is fraud or other compelling circumstances. *See Nolan, supra*. In this matter, no such compelling circumstances exist. Therefore, the Commission orders that the eligible list for Police Lieutenant (PM0921S), Asbury Park eligible list be revived in order to

effectuate the appointment of Bercovicz to that title on March 2, 2015 for seniority purposes only.

As to Bercovicz' eligibility for the examination for Police Captain (PM0620V), Bercovicz must have actually served in and performed the duties of the title of Police Lieutenant during the requisite time-in-grade in order to be eligible. The power to award, based on administrative error, delay, or other good cause, retroactive seniority to individuals who have in some way been harmed with the concomitant right to sit for promotional examinations, implicitly recognizes the principle of merit and fitness for promotion. In this regard, neither the settlement nor the appointing authority's submission stipulates that Bercovicz has been working as Police Lieutenant. Thus, as of the closing date for the Police Captain examination, September 30, 2017, he did not have any time served, either as a provisional or permanent Police Captain. *See In the Matter of David J. Barrett, et al.* (MSB, decided November 19, 2003). In that decision, the former Board noted that, only in certain circumstances, where an administrative error, delay or omission has occurred, and the employee actually served in and performed the duties of the title as of the date of the retroactive appointment, the additional relief of entitlement to promotional opportunities based on retroactive appointment dates has been granted. While Asbury Park has no objection to the administration of the Police Captain examination to Bercovicz, the announcement required one year of permanent service as a Police Lieutenant as of the closing date. Thus, as of the closing date, the appellant lacked the required year of service in the title of Police Lieutenant.

Nevertheless, should Bercovicz successfully complete his working test period, he should be afforded the opportunity to take a make-up examination for Police Captain (PM0620V), Asbury Park because he would have been eligible as of the September 30, 2017 closing date had he been previously appointed. As such, Bercovicz should complete the promotional application and submit the application fee. A copy of the promotional application is attached for his use and should be submitted, along with a \$75.00 application fee **and a copy of this decision**, within 20 days of receipt of this decision to the address listed on the top left of the first page of the application. Upon completion of his working test period, he should be admitted to the examination and given a make-up examination when appropriate.

On a final note, as the eligible list is incomplete for Police Lieutenant (PM0921S), Asbury Park, the appointing authority is not required to certify the list for appointment. Further, this settlement agreement was executed prior to authorization by the Department of DCA. However, the approval of the promotion was signed just over a month later. Going forward, Asbury Park is notified that it must present settlement agreements to DCA representatives before execution and submission to the Commission.

**ORDER**

Therefore, it is ordered that this request be granted, and the Police Lieutenant (PM0921S), Asbury Park eligible list be revived for Bercovicz to be appointed retroactive to March 2, 2015 as a Police Lieutenant, for seniority purposes only, and his personnel record of be amended in accordance with this decision. It is further ordered that the request for his admittance to the Police Captain (PM0620V), Asbury Park promotional examination be granted upon receipt of his properly completed promotional application and completion of his working test period.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 5<sup>th</sup> DAY OF SEPTEMBER, 2018



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
Written Record Appeals Unit  
P. O. Box 312  
Trenton, New Jersey 08625-0312

Attachment

c: Amir Bercovicz  
Michael Capabianco  
Kelly Glenn  
Records Center